Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: December 4, 1997
CASE NO: 96-INA-373

In the Matter of:

MEMORIES RESTAURANT
Employer

On Behalf of:

CESAR A. CRUZ
Alien

Appearance: Harlan E. Schackner, Esquire
West Orange, New Jersey
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States

who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27 (c).

Statement of the Case

On March 8, 1994, Memories Restaurant ("employer") filed an application for labor certification to enable Cesar A. Cruz ("alien") to fill the position of Garde Manger at an hourly wage of $10.95 (AF 15). The job duties are described as follows:

> Prepares dishes such as meat loaves and salads, utilizing leftover meats, seafoods, and poultry. Consults with supervisory staff to determine dishes that will use greatest amount of leftovers. Prepares appetizers and relishes. Chops, dices and grinds meats and vegetables. Slices cold meat and cheese. Arranges and garnishes cold meat dishes. Prepares cold meat sandwiches. Mixes and prepares cold sauces, meat glazes, jellies, salad dressing and stuffings. Follows recipes to prepare food. Estimates food consumption and requisitions and purchases supplies. Purchases food stuffs and produce at market (AF 15).
>
> The job requirements are two years of experience in the job offered (AF 15).

On December 12, 1995, the CO issued the Notice of Findings proposing to deny the labor certification. The CO cited a violation of §656.21 (b) (5) which requires the employer to document that the requirements are the minimum necessary for the performance of the job, and that the employer has not hired, or that it is not feasible to hire, workers with less training or experience. The CO noted that the alien had no experience in the position of Garde Manger prior to his employment with the employer. The CO stated this finding may be rebutted by submitting evidence documenting that it is infeasible to train and hire a U.S. worker, or by eliminating the requirement (AF 26). The CO also found that the employer violated § 656.21 (b) (2) which provides that if an employer's job opportunity involves a combination of duties, it must document that it has normally employed persons for that combination of duties in the area of intended employment, and/or the combination of duties arises from business necessity. The CO noted that a garde manger does not typically perform some of the duties which the employer listed on its certification application. These include estimating food consumption and purchasing supplies and foodstuffs.

In rebuttal, dated January 3, 1996, the employer stated that its annual volume of business has increased from $760,000 to about $1,000,000 while the restaurant's workforce has remained

[1] All further references to documents contained in the Appeal File will be noted as "AF."

constant at a total of ten. The employer insisted that it must maximize the use of its existing labor force to stay competitive in the Northern New Jersey area (AF 35). The employer stated that the Owner/Head Chef trained the alien, and argued that he no longer has time to expend training a new worker particularly when the alien already is able to perform the job duties. With regard to the combination of duties issue, the employer argued that the duties for the position so closely resembled those specified for Garde Manger in the Dictionary of Occupational Titles (DOT) that it should not be required to demonstrate business necessity. Notwithstanding this claim, the employer attempted to demonstrate business necessity by arguing that all of the duties are essential for the successful performance of the offered position (AF 36).

The CO issued the Final Determination on January 31, 1996 denying the labor certification. The CO found the employer's rebuttal argument unpersuasive on both grounds, and concluded that the employer failed to adequately rebut the issues raised in the NOF. On April 15, 1996, the employer requested review of Denial of Labor Certification pursuant to § 656.26 (b) (1) (AF 61).

Discussion

The issues presented by this appeal are whether the employer specified the minimum job qualifications for the offered position of Garde Manger pursuant to § 656.21 (b) (5), and whether the employer unlawfully combined job duties thus requiring it to document business necessity as required by § 656.21 (b) (2) (ii).

Section 656.21 (b) (5) provides that an employer is required to document that its requirements for the job opportunity are the minimum necessary for the performance of the job, and that the employer has not hired workers with less training, or that it is not feasible to hire workers with less training, than that required by the employer's job offer. This section addresses situations where the employer requires more stringent qualifications for a U.S. worker than it requires of the alien, and prevents the employer from treating an alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a/ Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990). It is well settled that an employer violates § 656.21 (b) (5) if it hired the alien with lower qualifications than it specified on the labor certification application, unless the employer demonstrates that it is infeasible to train U.S. workers. *See Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory*, 88-INA-104 (Dec. 22, 1988); *MMMats, Inc*, 87-INA-540 (Nov. 24, 1987). Furthermore, the Board also has held that under § 656.21 (b) (5), an employer may not require U.S. applicants to have the same type of experience that the alien acquired only while working for the employer in the same job. *Central Harlem Group, Inc.*, 89-INA-284 (May 14, 1991).

In this case, the employer did not dispute the CO's finding that the alien gained the requisite experience for the offered position while working for the employer. Instead, the employer argued that it was not feasible to train another worker for the position because it has

experienced substantial business growth in recent years. The Board has held that an increase in the volume of business or general growth and expansion, by itself, is insufficient to establish infeasibility. Moreover, unless an employer proves otherwise, increased training capability is presumed to accompany growth. *See Super Seal Manufacturing Co.*, 88-INA-417 (Apr. 12, 1989) (*en banc*); *AEP Industries*, 88-INA-415 (Apr. 4, 1989) (*en banc*); *Green Kitchen Restaurant*, 91-INA-259 (July 17, 1992) (increased capability is presumed to accompany growth). The presumption established by these cases is applicable to the instant case as the employer indicated that since the time of the alien's hire, the restaurant's business income has increased from $760,000 to $1,000,000 in recent years.

Moreover, we believe this case is analogous to the Board's decision in *Pueblo Automotive, Inc.*, 93-INA-505 (March 8, 1995). In that case, the employer applied for labor certification to enable the alien to fill the position of Mechanical Engineer. The employer readily acknowledged that the alien had obtained the required experience while working for the company, but maintained that it was infeasible to train a U.S. worker for the offered position due to its substantial increase in business transactions. Despite the employer's claim of infeasibility, the Board affirmed denial stating that an increase in volume of business is insufficient in carrying the employer's burden of proof. Following the precedence of *Pueblo Automotive*, we hold that the employer in the instant case has failed to establish infeasibility. Accordingly, we conclude that labor certification properly was denied. For the reasons stated, we find it unnecessary to address the combination of duties issue raised by the CO.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.